SUPREME COURT, U. S.

DEC 13 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 910

EARL SPIGNER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

This is a Petition for Writ of Certiorari to review a judgment of the Supreme Court of the State of California dated September 21, 1967, denying, without opinion, a hearing on the decision of the Court of Appeal for the State of California dated June 27, 1967, affirming the judgment of conviction and modifying the sentence in part. The judgment of conviction which was affirmed by the Court of Appeal was rendered by the Superior Court of the State of California on April 21, 1966.

A copy of the official opinion of the Court of Appeal

concerning the within matter, certified for non-publication, is attached hereto (Appendix "A").

A denial of a Petition for Hearing in the Supreme Court of the State of California was had, without opinion, on September 21, 1967 (Appendix "B").

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(3), the Supreme Court of the State of California being a Court of last resort.

STATEMENT OF THE CASE

By an Information filed on July 30, 1965, Petitioner and one Charles Hays were charged in one count with the crime of burglary (California Penal Code section 459). Petitioner was charged with burglarizing a Von's Shopping Bag Market located in the City of West Covina, County of Los Angeles, State of California, on April 10, 1965 (C.T.[1] 118).

By an Amended Information dated December 1, 1965, Petitioner alone was charged in Count I with burglarizing a Von's Shopping Bag Market located in the City of West Covina, on April 19, 1965. Count II of the Amended Information charged Petitioner with the crime of receiving stolen property (California Penal Code section 274). The stolen property alleged to have been received by Petitioner in

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1 As used herein, C.T. and R.T. refer to the Clerk's Transcript and the Reporter's Transcript, respectively, both of which have been made a part of the certified record.

Count II consisted of a Victor safe and approximately $24,900.00 in checks, money orders and cash, which property was allegedly involved in the burglary charge set forth in Count I of the Amended Information. (C.T. 119-120.)

In a Second Amended Information dated December 6, 1965, Petitioner alone was charged with conspiracy (California Penal Code section 182) to commit the crimes of violations of sections 459, 487.1 and 496 of the California Penal Code. Count II of the Second Amended Information set forth the same burglary count contained in Count I of the First Amended Information, and Count III of the Second Amended Information set forth the same receiving-stolen-property charge contained in Count II of the First Amended Information. (C.T. 121-124.)

On December 6, 1965, Petitioner pled not guilty to all counts contained in the Second Amended Information (C.T. 131). Petitioner had previously pled not guilty to the original information on August 23, 1965 (C.T. 127).

The certified record (page 134 of the Clerk's Transcript) contains an entry dated March 22, 1966. Esentially, this entry is on a written court form and states that the defendant and all counsel waive jury trial and further recites that it was stipulated by counsel that the matter could be submitted on the transcript of the preliminary hearing, with each side reserving the right to offer additional evidence. A copy of page 134 of the certified record referred to above is set fo th in Appendix "C" hereto.

On page 136 of the Clerk's Transcript, there is an entry dated April 21, 1966. This entry indicates that the court had read and considered the testimony contained in the

preliminary transcript, that the People rested, that Essie Spigner and Petitioner testified for the defense, and that Donald H. Miller testified for the People in rebuttal. Whereupon, the court found Petitioner guilty as charged in Counts I and II of the Second Amended Information and not guilty as charged in Count III. Petitioner was found, in Count II, to be guilty of burglary in the second degree.

On May 20, 1966, a motion for new trial was heard and denied. A Notice of Appeal was also filed on this date; bail on appeal was fixed; and a stay was granted pending a determination of the case on appeal (C.T. 139-140).

QUESTION PRESENTED

Whether an entry on a printed form docket sheet of the Clerk of the trial court, which recites that the defendant has waived his right to a jury trial and further recites that "by stipulation of counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing," constitutes a denial of the defendant's constitutional right to be confronted by the witnesses against him (Amendments VI and XIV, United States Constitution), especially in light of the fact that the ostensible waiver is not substantiated in the Reporter's Transcript.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are printed in Appendix "D." They are: Amendment VI and Amendment XIV to the United States Constitution.

STATEMENT OF FACTS

The following is a concise statement of the facts material to the consideration of the questions presented herein.

At page 134 of the Clerk's Transcript is found the Minutes of the proceedings held on March 22, 1966, in Department East A of the Los Angeles Superior Court. The Minutes are contained in a printed form of Minute Order which recites as follows:

> "Cause called for trial. The defendant personally and all counsel waive jury trial.
>
> "By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings.
>
> "It is further stipulated that any exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's ruling."

The matter was then continued for trial to April 20, 1966, and thereafter to April 21, 1966.

The Reporter's Transcript of proceedings shows (pp. 2 and 3) that Petitioner waived jury on March 22, 1966. On April 21, 1966, without any further waiver being taken from the defendant, the court stated (R.T. 4):

> "The record will show that I have received the Preliminary Transcript, which I have read

and considered in accordance with our previous stipulation. . . . "

No further indication that the Petitioner waived his constitutional right to be confronted by the witnesses against him is contained in the record.

REASONS FOR GRANTING THE WRIT

This Petition presents to the Court, apparently for the first time, a new and novel question of law. In essence, the issue presented is whether an entry on a printed form docket sheet of the Clerk of the trial court, which purportedly indicates that the defendant has waived his constitutional right to be confronted by the witnesses against him, without this waiver being substantiated in the Reporter's Transcript, is not in fact an insufficient waiver of this substantial constitutional right and, consequently, a violation of the right.

ARGUMENT

Whether An Entry On A Printed Form Docket Sheet Of The Clerk Of The Trial Court, Which Recites That The Defendant Has Waived His Right To A Jury Trial And Further Recites That "By Stipulation Of Counsel The Cause Is Submitted On The Testimony Contained In The Transcript Of The Proceedings Had At The Preliminary Hearing," Constitutes A Denial Of The Defendant's Constitutional Right To Be Confronted By The Witnesses Against Him (Amendments VI and XIV, United States Constitution), Especially In Light Of The Fact That The Ostensible Waiver Is Not Substan-

tiated In The Reporter's Transcript.

It is respectfully submitted that the entry which is contained on the printed form docket sheet of the Clerk of the trial court is insufficient to constitute either a waiver by the Petitioner of his right to be confronted by the witnesses against him or a personal stipulation that the court might read and consider the transcript of the proceedings had at the preliminary hearing and consider the testimony of those witnesses. The deficiency in the record is all the more acute since the Reporter's Transcript does not even contain any evidence that Petitioner's counsel consented to such a procedure.

Waiver has been defined as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 1026, 82 L. Ed. 1461, 1466. If, as in the instant case, the Petitioner has not been apprised of his right to be confronted by the witnesses against him, it is inconceivable that he can be said to have been aware of that right and to have waived it.

It cannot be doubted that an individual's right to be confronted by the witnesses against him is substantial and one which is within the protection of the Fourteenth Amendment to the United States Constitution. *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065, 12 L. Ed. 2d 923. The crucial inquiries in the instant case are, therefore, twofold:

(1) Whether a recitation on a printed form docket sheet of the Clerk to the effect that it was stipulated that the matter be submitted on the transcript of the preliminary hearing is conclusive evidence of the fact that the Petitioner agreed to the submission on the transcript, irrespective of the fact

that the Reporter's Transcript is devoid of any reference to such a stipulation; and

(2) Assuming the stipulation was in fact made, whether an attorney can stipulate away the right to confrontation without the defendant's consent.

Petitioner has been unable to discover any cases decided by this Court which directly involve the issue herein presented. However, the Supreme Court of the State of California has very recently had the occasion to discuss the effect of a recitation in the docket that a certain act was in fact performed. In *In re Smiley*, 66 AC 634, the California Supreme Court was concerned with the issue of whether the defendant had been advised of his right to court-appointed counsel. The defendant contended he had not been so advised, but a docket entry indicated that he had been advised. In *Smiley*, the court stated:

> ". . . The official docket entries of that court show that petitioner appeared in propria persona, was 'duly arraigned,' pleaded not guilty, and thereafter defended himself without benefit of counsel. There is no entry specifically reflecting that petitioner was given the necessary advice as to his constitutional and statutory rights.
>
> "It is true that in *In re Woods* (1966) 64 Cal. 2d 3, 7 [48 Cal. Rptr. 689, 409 P. 2d 913], we held that a docket entry reciting that the defendant was ' "duly arraigned" ,' in a jurisdiction (Utah) having a statute identical to our Penal Code section 987, *supra*, required us to give effect to the presumption that 'official duty was performed' and 'the principle that every reasonable intendment must be made in

favor of judgments collaterally attacked,' by 'assuming' that the defendant was properly advised of his rights to counsel. . . . In . . . [*In re Johnson*, 62 Cal. 2d 325, at pp. 330-331] we made it clear we were not satisfied to rest a finding that the defendant was properly advised solely on a recital in the minutes that he had been 'duly arraigned'; we stated, rather, that since the rights involved were of constitutional dimension we would 'look to the entire record to ascertain the meaning of the entry,' . . . In view of the importance of the constitutional and statutory guarantees in issue, it does not appear too great a burden on the trial judges or clerks under their direction to require minute or docket entries specifically listing the rights of which the defendant is actually advised.[2] As the United States Supreme Court said in a related context, 'No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.' (*Miranda v. Arizona* (1966), *supra*, 384 U.S. 436, 471-472 [16 L. Ed. 2d 694, 722, 86 S. Ct. 1602, 10 A.L.R. 3rd 974]." (66 AC 634, 643-644.)

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2 At this point in the above-referenced case, the California Supreme Court set forth Footnote 8, which contained the following significant language:

"Such entries, of course, must be prepared for the particular case before the court; the requirements will not be satisfied by the use of minute forms containing printed recitals of this advice. [Citations omitted.]"

Although, of course, *Smiley* is in no way binding upon this Court, it is respectfully submitted that the case provides persuasive authority for the proposition herein advanced by Petitioner. Based on *Smiley*, it is respectfully submitted that the mere fact that the docket reflects a stipulation to submit a case on the transcript of the preliminary hearing does not mean that the defendant in fact consented to such a stipulation. It is further submitted that in light of the importance of the constitutional right involved, the waiver of this right cannot be presumed from such a recital or from a silent record. *Cf. People v. Salcido*, 246 ACA 512, 54 Cal. Rptr. 820, wherein the court held that it will be presumed from a silent record that the defendant has not been advised of his constitutional right to counsel. For the same holding, see also *People v. Furnish*, 63 Cal. 2d 511, 47 Cal. Rptr. 387; *People v. Liliock*, 62 Cal. 2d 618, 43 Cal. Rptr. 699.

As was indicated before, the right to be confronted by witnesses is a substantial one which the attorney for the defendant may not stipulate away. In this connection, and even assuming *arguendo* that the recitation in the docket can be construed to be a sufficient waiver by the Petitioner of his right to be confronted by the witnesses against him, the Court's attention is respectfully directed to the decision by the California Supreme Court in *People v. Davis*, 48 Cal. 2d 241, 309 P. 2d 1, wherein the court stated:

> ". . . It is a violation of his [an attorney's] duty of fidelity to his client to assume a position adverse or antagonistic to his '*without the latter's free and intelligent consent given after full knowledge of all facts and circumstances.*' (*Anderson v. Eaton*, 211 Cal. 113, 116 [293 Pac. 788, 789].)

> This consent was not given. *Without such consent an attorney may not surrender any substantial right of the accused. (Hoaglan v. Chargin,* 134 Cal. App. 2d 466, 474 [286 P. 2d 931]; *Redsted v. Weiss,* 71 Cal. App. 2d 660, 663 [163 P. 2d 105] nor may he impair, compromise or destroy his client's cause of action. [Citations omitted.]" (48 Cal. 2d 241, 256, 309 P. 2d 1, 9.) (Emphasis added.)

It is respectfully submitted that even assuming Petitioner's trial counsel stipulated to have the matter heard on the transcript of the preliminary hearing, such a stipulation was not binding on the Petitioner in the absence of evidence that he expressly waived his right to be confronted by the witnesses against him. Since there is not a scintilla of evidence in the record that Petitioner waived this substantial right, a reversal of the conviction must follow. In this connection, two decisions of this Court are pertinent:

In *Fay v. Noia,* 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837, the petitioner and two other defendants were charged with murder and convicted. The other defendants appealed but petitioner did not. Subsequently, the other two defendants utilized other legal machinery to procure their release from custody on habeas corpus. Petitioner sought his release and the state defended the petition by contending that petitioner had waived his rights by failing to prosecute an appeal. To this argument, this Court replied:

> ". . . The classic definition of waiver enunciated in *Johnson v. Zerbst,* 304 US 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 – 'an intentional relinquishment or abandon-

ment of a know right or privilege' – furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits – though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. *Cf. Price v. Johnston*, 334 US 266, 291, 92 L. Ed. 1356, 1372, 68 S. Ct. 1049. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. *Cf. Carnley v. Cochran*, 369 US 506, 513-517, 8 L. Ed. 2d 70, 75-78, 82 S. Ct. 884; *Moore v. Michigan*, 355 US 155, 162-165, 2 L. Ed. 2d 167, 172-174, 78 S. Ct. 191. *A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. E.G., Rice v. Olson*, 324 US 786, 89 L. Ed. 1367, 65 S. Ct. 989." (372 U.S. 391, 439.) (Emphasis added.)

In *Fay*, the Court stated that the petitioner certainly

was not guilty of deliberately by-passing state procedures, because, under the law as it then existed, petitioner's choice not to appeal was undoubtedly based on the fact that if he appealed and was re-tried he would have been subject to the death penalty, whereas he was given life imprisonment after the first trial. Since, in the instant case, it can hardly be suggested that Petitioner was guilty of intentionally attempting to by-pass state procedures so that he could assert his federal constitutional rights, it is respectfully submitted that this Court's reasoning in *Fay* is applicable herein.

The following language of this Court in *Henry v. Mississippi*, 379 U.S. 443, 451-452, 85 S. Ct. 564, 13 L. Ed. 2d 408, is also relevant to the issue here under discussion:

> ". . . *Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims,* see *Whitus v. Balkcom*, 333 F. 2d 496 (CA 5th Cir. 1964), we think that the deliberate by-passing by counsel of the contemporaneous-objection *rule [*379 US 452] as a part of trial strategy would have that effect in this case." (Emphasis added.)

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Petition for Writ of Certiorari be granted and that the issues herein raised by given plenary consideration by this Court.

Respectfully submitted

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Attorneys for Petitioner

Appendix "A" - Opinion of the Court of Appeal of the State of California (1–9)

Appendix "B" - Denial of Petition for Hearing in Supreme Court of California

Appendix "C" - Clerk's Transcript page 134

Appendix "D" - United States Constitution
VI Amendment
XIV Amendment

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

2nd CRIM. No. 12576.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EARL SPIGNER, Defendant and Appellant.

Filed June 27, 1967.

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APPEAL from a judgment of the Superior Court of Los Angeles County, Howard D. McClain, Judge. Affirmed as modified.

Marks & Schneider and Burton Marks for Defendant and Appellant.

Thomas C. Lynch, Attorney General, Doris H. Maier, Assistant Attorney General, Raymond M. Momboisse, Deputy Attorney General, Daniel J. Kremer, Deputy Attorney General, and David R. Pigott, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant appeals from the judgment entered against him following a nonjury trial that resulted in his conviction of the crimes of burglary and conspiracy to commit burglary. Although the judgment entered in the minutes fails to so indicate, the trial judge expressly stated that he was aware that Penal Code, section 654, would preclude punishing appellant upon both convictions and therefore ordered that the sentence imposed on the conspiracy count be suspended. Such procedure is proper. (*In re Wright*, 65 A.C. 698, 703,

fn. 4.)

By way of assignment of error appellant contends that (1) he did not "personally submit his case upon the Preliminary Transcript," and (2) that "the evidence is not sufficient to connect him to the crimes alleged in the information." We have concluded that neither contention is meritorious.

The reporter's transcript of the proceedings on March 22, 1966, reflects appellant's personal waiver of his right to a jury trial and the court's minutes for that date read as follows:

"By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that any exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's ruling."

It has been repeatedly held in California that a defendant need not join in such a stipulation personally so long as he is aware thereof and offers no objection thereto. (*People v. Andrews*, 234 Cal. App. 2d 69, 77-79, and the many cases cited therein.)

The verity of the minutes regarding the stipulation and the fact that appellant himself was aware of the stipulation and offered no objection thereto is confirmed by the following dialogue between the court and appellant's counsel in his presence at the continued hearing on April 21, 1966, reflected in the reporter's transcript of the trial proceedings conducted on that date:

"THE COURT: We will call the Earl Spigner matter at

this time. MR. YOUNGQUIST: The People are ready. MR. LENOIR [counsel for appellant]: The defendant is ready. THE COURT: The record will show that I have received the Preliminary Transcript, which I have read and considered in accordance with our previous stipulation. Mr. Lenoir, did you want me to return your copy at this time or do you need it? MR. LENOIR: I do not particularly need it." Thereafter, full stipulations designed to shorten the time of trial were entered into and further evidence was introduced by both the prosecution and the defense. At no time did appellant offer any objection to this procedure and tacitly acquiesced therein. We find no error and certainly none that appellant may urge for the first time on appeal.

The evidence, as appellant concedes, conclusively establishes that a major burglary was committed at a Von's Shopping Bag store on the night of April 18, 1965, or during the early morning hours of April 19, 1965. Virtually unimpeachable physical evidence demonstrates that appellant's brother-in-law, Charles Hays, and two other men used two rented trucks to transport various items, including a safe containing approximately $25,000, that had been taken from the premises. One of these trucks had been rented by Hays on the morning of April 19, 1965, but his attempt to rent the other on the preceding day, April 18, 1965, had been frustrated by his inability to produce adequate identification. Appellant rented this second truck between a half hour and an hour and a half after his brother-in-law's effort so to do had failed. Paint and wood specimens established that these trucks had been used in transporting the stolen equipment and an eye witness had identified them after seeing three men abandoning the broken safe on the morning of April 19, 1965. This

witness was able positively to identify the trucks but not the three men he had seen using them. However, appellant personally returned the truck he had rented later that morning.

Upon a search incident to the arrest of co-defendant, Charles Hays, there was seized: ten books of Bank of America Travellers' Checks of denominations ranging from $20 to $50 to $100 which were bought on April 22, 23, and 25, 1965, at two different branches of the Bank of America, the total value of the checks being $3,700; two dealer's safe manuals, a Star safe manual and a Schwab safe manual found under Mr. Hays' bed; plane tickets from Los Angeles to San Francisco and from San Francisco to Los Angeles made out to Mr. and Mrs. Charles Hays, bearing the dates April 23 on the tickets to San Francisco and April 26 on the return trip; a shaving kit containing $296 in $1 bills; coins in a trunk in the amount of $239.89; a length of chain in the trunk of a Buick car registered to Charles Hays; a man's blue suit and a pair of brown shoes from a closet in the residence in which Hays was arrested; and a page from a telephone book with the heading "markets" in the trunk of a 1965 Mustang registered to Charles Hays found parked in front of Hays' residence.

Tar chips from the ceiling of the market where entry had been made through a hole cut therein, matched tar fragments found in the cuffs of the blue suit seized incident to the arrest of appellant's brother-in-law. Yellow and blue paint chips from the chain found in Hays' automobile matched paint samples taken from the yellow and blue trucks used in the burglary. Fibres taken from a tree branch found with the abandoned safe and from the blue suit and the shoes seized on Hays' arrest, were the same as fibres taken from a multicolored blanket that had been removed from the burglarized

store.

Appellant testified that "one of his sisters" had told him on some unspecified date following the burglary that a warrant was outstanding for his arrest in connection therewith, i.e., he was told the "details as to who wanted [him] and why." Nonetheless, allegedly upon advice of counsel, appellant determined not to surrender himself or to otherwise communicate his innocence to the police but simply to avoid apprehension in order to "let the case develop."

Appellant ultimately was apprehended in an area where there had been a recent increase in burglaries. The police had stopped a car in which appellant was a passenger for routine investigation into the cause of the "apparent nervousness of the driver" and the fact that the rear seat was "loaded with what appear[ed] to be clothing." Appellant had falsely identified himself as Herman Earl Brown and exhibited a temporary interim driver's license which he had obtained in that name.

On direct examination appellant testified that the reason he had applied for a driver's license under an assumed name was that his own license had been suspended prior to the burglary involved in the instant case and he "had to have a driver's license in order to get a job." He further testified that he had denied his true identity because "That was on the I.D. I had on me at the time and at the time they arrested me was supposed to be for a robbery suspect." However, on cross-examination the following questions and answers were given:

"Q. Then you knew there was a warrant for Earl Spigner when you were stopped by the Los Angeles Police Department; is that correct? A. Yes, I did. Q. In spite of that, you presented a driver's license with a name of Herman Earl Brown on it,

sir? A. Yes. Q. Did you ever tell the police that you were Earl Spigner before they identified you and told you you were Earl Spigner, sir? A. No. Q. *Is that because you did not want to get caught, sir? A. Well, [you] might say that. My attorney advised me to do that, let the case develop.*" (Emphasis added.) Subsequently the prosecution established that contrary to his testimony, appellant's own driver's license was valid until October 11, 1965, some five months after his arrest and six months after the commission of the burglary for which he was convicted.

In connection with his alleged inability to find full time work because of the loss of his driving privilege prior to the instant burglary, appellant was asked how it was that he had been able to buy a new Cadillac. Appellant replied that although he had filled out the credit application and taken title to the car in his name, he actually was merely acting as agent for an undisclosed principal, one Bobby Boyd, who was unable to effect the purchase directly by reason of his status as a parolee. Appellant testified that he did not know whether or not this Bobby Boyd was "the fellow that has the joint bank account with Charles Hays," but when asked if Boyd was a good friend of his brother-in-law he replied: "Well, he is a relative of mine; . . . [a] cousin by marriage."

By way of defense appellant testified that he indeed had rented the truck used in the robbery but had done so merely to aid a friend, Vernon Brown, who was moving that day and who did not have a driver's license. He asserted that he had merely rented the truck in his own name and then delivered it to Brown and returned home. He stated that he was advised by telephone the following day where to pick up the truck and he had done so and returned it to the rental agency. He had

been unable to locate Brown thereafter and until the day of trial had never told the police or anyone else that such a person existed and had not sought help in locating him. Appellant admitted that he had previously been convicted in the federal courts for the crime of smuggling.

Appellant's mother was called to supply partial corroboration to appellant's alibi. She testified that although the trial was held more than a year after the commission of the robbery, she could remember that her son had been at home all that day except between the hours of 1 to 5 p.m. She asserted that she could remember the events of the day although she had not had occasion to recall it until appellant's attorney called it to her attention a week before the trial because one of her grandchildren had begun "running a temperature" on April 18, 1965. She offered no explanation for how she was able to remember that the child was ill on these particular dates since, although she has a calendar on which she keeps records, she didn't "particularly put that on there." In addition, although she testified that she remembered seeing her son watching television after dinner on the evening of April 18, 1965, she gave no testimony relating to her knowledge of his whereabouts during the late hours of the night and the morning of the 19th during which the burglary apparently occurred.

Insofar as appellant's defense was based upon an alibi, it is immediately apparent that his contention regarding the sufficiency of the evidence presents nothing for appellate review. As stated in *People v. Johnson,* 210 Cal. App. 2d 273, 276: "Each defendant called several witnesses in his behalf in an attempt to establish an alibi. It is apparent the [trier of fact] did not believe these witnesses or the defendants' version of where they were at the time of the commission of the

[burglary]. 'The weight to be given to the testimony of the witnesses, whether in support of an alibi or otherwise, and their credibility, present questions for the determination of the [trier of fact] which is binding upon this court on appeal. [Citation.]' " (See also *People v. Williams,* 53 Cal. 2d 299, 303; *People v. Pshemensky,* 244 A.C.A. 183, 186.)

Similarly unmeritorious is appellant's contention that the evidence is insufficient since it is entirely circumstantial and "such evidence to sustain conviction must not only be consistent with guilt but inconsistent with innocence." This contention demonstrates a failure to grasp the essential and basic difference in the functions performed by the trial and appellate courts. "It is the trier of fact, not the appellate court, that must be convinced of a defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*People v. Robillard,* 55 Cal. 2d 88, 93.)

"Nor is it necessary 'in order to establish the defendant's guilt, that any of the witnesses should have actually seen him break and enter the premises, or should have seen him in the vicinity of the premises about the time the burglary was committed. It rarely happens that an offense, like that here complained of, can be proved by witnesses who saw and recognized the defendant in the act, and resort must, therefore, ordinarily be had to circumstantial evidence.' [Citation.] " 'In a prosecution for burglary the evidence on which a defendant is convicted may be purely circumstantial and if substantial, as in the present case, is sufficient to

support the judgment of guilty.' [Citations.]" (*People v. Murphy*, 173 Cal. App. 2d 367, 373.)

We agree with respondent's statement that "The physical evidence, the closeness of family relationship between appellant, co-defendant, and alibi witness, the patently unconvincing alibi as to use of the truck and presence at the time of the burglary, coupled with his guilt-reflecting acts upon being arrested more than justify the conclusion that appellant is guilty of the offenses charged."

The judgment is modified to reflect the fact that execution of the sentence imposed on Count I, conspiracy, was suspended, and as so modified it is affirmed.

HERNDON, J.

We concur:

ROTH, P.J.

FLEMING, J.

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.

DENIAL OF PETITION FOR HEARING IN SUPREME COURT OF CALIFORNIA

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

SEP 21 1967

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 2 Crim. No. 12576

People

vs.

Spigner

Respectfully

WILLIAM I. SULLIVAN
Clerk

67543-877 3-66 2500 OSP

APPENDIX "B"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. EAST A

MAR 22 19 66 Present Hon. Howard D.McClain Judge

Case No. 308005

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

X EARL SPIGNER

APPEARANCES:
(Parties and Counsel checked if present. Counsel shown opposite parties represented.)

X Evelle J. Younger, District Attorney, by Q Clifton Deputy

X E. J. Hovden, Public Defender, by G. Lenoir Deputy

Cause called for trial. The defendant(s) personally and all counsel waive jury trial.

By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings.

It is further stipulated that any exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's ruling.

Continued to April 20, 1966 at 9:30 AM. Bail.

APPENDIX "C"

UNITED STATES CONSTITUTION

VI AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

XIV AMENDMENT:

All persons born or naturalized in the United States, and subject to the jurisdiciton thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on December , 1967, I served the within Petition For Writ of Certiorari (Spigner v. People of the State of California) on the following named parties, by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Attorney General
State of California
600 State Building
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December , 1967, at Los Angeles, California.

_____

Subscribed and sworn to before me
this day of December, 1967

_____

Notary Public in and for the
State of California.

Orig. + 40 cys. lodged with United States Supreme Court

DEAN-STANDEFER, 215 W. 5th St., Los Angeles 90013

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SUPREME COURT, U. S.

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FILED
FEB 28 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 910

EARL SPIGNER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

THOMAS C. LYNCH, Attorney General
of the State of California

DORIS H. MAIER
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 910

EARL SPIGNER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeal of the State of California, in and for the Second Appellate District, Division Two, was filed on June 27, 1967, and is unreported. A copy of the opinion is attached to petitioner's brief as Appendix "A". The California Supreme Court denied a hearing on September 21, 1967. A copy of that order is attached to petitioner's brief as Appendix "B".

JURISDICTION

Since the instant petition for write of certiorari was filed on December 13, 1967, and since the order of the Supreme Court of the State of California denying a hearing was entered on September 21, 1967, the jurisdiction of this Court is timely invoked under 28 U.S.C. 1257(3), and Rule 22 of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Was petitioner denied the right to confrontation guaranteed him by the Sixth and Fourteenth Amendments when the record, as a whole, shows that petitioner's counsel, with appropriate reservations, agreed to the submission of the cause upon the transcript of the preliminary hearing; that petitioner was aware of this and similar stipulations and offered no objection to them; that sound tactical reasons existed for entering into the stipulation to submit; and that petitioner, while represented by counsel and with full opportunity to cross-examine, did confront the witnesses in question at the preliminary hearing?

STATUTES INVOLVED

The relevant statutes are printed in the Appendix: They are:

California Penal Code section 182
California Penal Code section 459
California Penal Code section 496

STATEMENT

History of the Case

On July 30, 1965, the District Attorney of Los Angeles County filed an information in the superior court for that county charging petitioner with violation of California Penal Code section 459, burglary (CT 118). On August 23, 1965, petitioner, represented by the public defender, pleaded not guilty to the charge set forth in the information (CT 127).[1]

On December 1, 1965, an amended information was filed charging petitioner with violation of California Penal Code section 459, burglary and violation of California Penal Code section 496, receiving stolen property (CT 119–120).

On December 6, 1965, a second amended information was filed charging petitioner with violation of California Penal Code section 182, conspiracy, and repeating the aforesaid allegations of burglary and receiving stolen property (CT 121–124). That same day, petitioner, represented by counsel, was arraigned upon this information and pleaded not guilty to the charges set forth (CT 131).

On March 22, 1966, petitioner, both personally and through counsel, waived jury trial (CT 134; RT 2).[2]

---

[1] CT refers to the Clerk's Transcript of the proceedings in the superior court below, which includes a transcript of the testimony taken at the preliminary hearing. Respondent's copy of said Clerk's Transcript is lodged with this Court.

[2] RT refers to the Reporter's Transcript of the proceedings in the superior court below, respondent's copy of which is lodged with this Court.

Through counsel, it was stipulated that the cause be submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to the court's rulings, with each side reserving the right to offer additional evidence (CT 134).

The cause came on for trial on April 21, 1966 (CT 136). In petitioner's presence, and without any objection from him, both counsel stipulated to the substance of the testimony of eleven witnesses (RT 4–13). Thereafter, additional testimony was taken on behalf of both petitioner and the People. Following argument, the court found petitioner guilty of conspiracy and burglary in the second degree (RT 68–69). A probation report was ordered and the matter was continued (CT 136).

On May 20, 1966, petitioner's motion for new trial was heard and denied. Probation was denied and petitioner was sentenced to the California State Prison for the term prescribed by law on both counts, the court staying execution of the sentence for conspiracy pending a final disposition on appeal (RT 77, CT 189). The court further ordered that petitioner's sentence should run concurrently with an outstanding federal term. (CT 189).

Notice of appeal was filed on May 20, 1966 (CT 140) and on June 27, 1967, the trial court's judgment was affirmed by opinion of the Court of Appeal of the State of California in and for the Second Appellate District (Petitioner's Appendix "A"). The

California Supreme Court denied a hearing on September 21, 1967 (Petitioner's Appendix "B").

The instant petition for writ of certiorari was filed on December 13, 1967.

Factual Statement

The facts of the crime are set out in the opinion of the Appellate Court below which petitioner has attached to his application for writ of certiorari as Appendix "A". The following facts regarding the submission upon the transcript of the preliminary examination are pertinent to the issue presented here.

> The Clerk's Transcript for March 22, 1966, states: "By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings." (CT 134.)

The Reporter's Transcript for that day does not include this stipulation, however, when the cause came to trial on April 21, 1966, the following colloquy was had between the court and defense counsel in petitioner's presence:

> "THE COURT: The record will show that I have received the Preliminary Transcript, which I have read and considered in accordance with our previous stipulation. Mr. Lenoir, did you want me to return your copy at this time or do you need it?

"MR. LENOIR: I do not particularly need it.
"THE COURT: If you do, just let me know . . . ." (RT 4.)

Petitioner's counsel immediately thereafter entered into stipulations with the prosecuting attorney as to the substance of the testimony of eleven witnesses (RT 4–13). The record shows no objection by petitioner.

SUMMARY OF ARGUMENT

Read as a whole, the record demonstrates that petitioner's trial counsel did enter into the stipulation to submit recited in the Clerk Transcript and that petitioner, fully aware of this decision, offered no objection to it.

A capacity to effect binding tactical decisions on behalf of his client is implicit in counsel's role as the manager of the lawsuit. Counsel's determination to submit herein was one such tactical decision and is supported by sound strategic considerations. It therefore binds petitioner.

In any event, the record demonstrates that petitioner was afforded full right to confront and cross-examine the witnesses against him at the preliminary hearing. The Sixth Amendment does not require that that confrontation be repeated each time that testimony is received into evidence.

ARGUMENT

I. Petitioner has not been denied his constitutionally guaranteed right to confront the witnesses against him

Petitioner's assertion that he has been denied the right to confrontation assured him by the Sixth and Fourteenth Amendments to the Constitution rests upon three grounds, the establishment of each of which is necessary to petitioner's cause; first, that aside from a printed recital in the Clerk's Transcript, the record does not show that either the petitioner or his counsel stipulated to the submission of the case on the transcript of the preliminary hearing; second, that even assuming such a stipulation on counsel's part, such a stipulation cannot bind petitioner unless the record demonstrates that he personally and intelligently associated himself with the stipulation; and third (a proposition which petitioner assumes, but never argues), that petitioner did not in fact confront the witnesses against him.

Respondent respectfully submits that none of these propositions will bear the weight assigned it.

A. THE RECORD AS A WHOLE DEMONSTRATES THAT PETITIONER'S COUNSEL STIPULATED TO THE SUBMISSION OF THE CASE UPON THE TRANSCRIPT OF THE PRELIMINARY HEARING AND THAT PETITIONER ACQUIESCED IN THAT STIPULATION

Petitioner here relies upon *In re Smiley* (1967) 66 A.C. 634, 58 Cal.Rptr. 579, 427 P.2d 179, for the proposition that since the stipulation was part of a printed form, it is insufficient to show that the stipulation actually occurred. *Smiley* is a right to counsel case. There the docket entry simply stated that peti-

tioner had been "duly arraigned" (*In re Smiley, supra,* at 643). The question then became whether the phrase "duly arraigned" imported full admonition and waiver of the petitioner's right to counsel. The difficulty with petitioner's reliance upon *Smiley* is that the entry in the Clerk's Transcript here is not a cryptic phrase, but a full exposition of the event and that, again, unlike *Smiley,* the subsequent record is not silent upon the issue. The task, as the California Supreme Court has indicated, is to "look at the entire record to ascertain the meaning of the entry." (*People* v. *Johnson* (1965) 62 Cal. 2d 325, 331, 42 Cal.Rptr. 228; 398 P.2d 420.)

Here, the Reporter's Transcript for April 21, 1966, contains the following illuminating colloquy between the court and defense counsel in petitioner's presence:

> "THE COURT: The record will show that I have received the Preliminary Transcript, which I have read and considered in accordance with our previous stipulation. Mr. Lenoir, did you want me to return your copy at this time or do you need it?
>
> "MR. LENOIR: I do not particularly need it.
>
> "THE COURT: If you do, just let me know . . . ." (RT 4.)

Thus, the record, far from being silent, demonstrates that the stipulation set out in the Clerk's Transcript did occur; that petitioner's counsel furnished the court with his own copy of the transcript and that petitioner, personally present, raised no objection either to this stipulation or the immediately

subsequent stipulations as to the substance of the testimony of eleven witnesses (RT 4–13).

Further, the stipulation in question was wholly consistent with petitioner's defense which was to admit those facts which the People could easily prove (the occurrence of the burglaries, petitioner's renting a truck subsequently used to transport stolen goods and petitioner's giving a false name on being arrested) to attack the evident weakness in the People's case (that petitioner could not be identified as the driver of the truck) and to present an alibi for the critical periods (RT 17–18) coupled with an attempt to explain the renting of the truck and giving a false name on arrest (RT 31–32, 29–30).

Respondent therefore submits that a reading of the stipulation set out in the Clerk's Transcript in light of the exchange at RT 4, the evident defense strategy, and petitioner's failure to record an objection amply demonstrates that the asserted stipulation did occur, that the petitioner knew of it and acquiesced in it.

B. DEFENSE COUNSEL'S TACTICAL DECISION TO STIPULATE TO THE SUBMISSION OF THE CAUSE UPON THE TRANSCRIPT OF THE PRELIMINARY HEARING, WITH THE RESERVATION THAT HE MIGHT PRODUCE ADDITIONAL WITNESSES IS BINDING UPON PETITIONER

Petitioner's second line of attack is the assertion that in any event, a defense counsel's stipulation which amounts to a waiver of any of a defendant's constitutional rights is not valid unless that defendant personally, expressly and intelligently agrees to the stipulation. Such is not the case under either California or federal law.

In *Fay* v. *Noia* (1963) 372 U.S. 391, this Court set out the familiar requisites for the waiver of a constitutional right at page 439:

> "[T]he classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price* v. *Johnston*, 334 U.S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. Cf. *Carnley* v. *Cochran*, 369 U. S. 506, 513–517; *Moore* v. *Michigan*, 355 U. S. 155, 162–165. *A choice made by counsel not participated in by the petitioner does not automatically bar relief.*" (Emphasis added.)

As the Ninth Circuit has noted:

> "Implicit in this statement is the notion that in the proper circumstances counsel for the accused may effectively waive certain rights of the accused

during the course of his representation of the accused and as a matter of trial strategy or tactics." (*Wilson* v. *Gray* (9th Cir. 1965) 345 F.2 282, 288–289, Cert. Den. 382 U. S. 919.)

Any doubts that this proposition applied to the waiver of a defendant's constitutional rights were dispelled by *Henry* v. *Mississippi* (1965) 379 U. S. 443. That case involved defense counsel's failure to object to the introduction of illegally seized evidence. There, this Court stated at pages 451–452:

> "[I]f either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see *Whitus* v. *Balkcom*, 333 F.2d 496 (C. A. 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case."

That such must of necessity be the rule absent exceptional circumstances follows from the very nature of the right to counsel and the need for that right.

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right

> to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." (*Powell* v. *Alabama* (1932) 287 U.S. 45, 68-69.)

If counsel's role is to guide, he must be free to do so and his decisions must be binding upon the one whom he leads. As the Ninth Circuit observed in commenting upon the *Powell* case and those following it:

> " 'We are in hearty agreement with these views. And we think that it inevitably flows from them that when a defendant has counsel * * * it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there.' " (*Wilson* v. *Gray*, 345 F.2d 282 (9th Cir. 1965), p. 290, Cert. Den. 382 U. S. 919.)

The issue is thus resolved into two questions: is the situation here the exceptional one, and was counsel's decision and stipulation to forego additional cross-examination of the witnesses who had appeared at the preliminary hearing motivated by tactical considerations consistent with petitioner's theory of defense

at trial? The answer to the first question is plainly no—exceptional circumstances are neither asserted by petitioner nor do they appear from the record (compare *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964)). As plainly, the answer to the second is that prudent tactical considerations motivated counsel's action.

As stated previously, the strategy adopted by petitioner's counsel was to admit or at least not to challenge what the People could easily and definitely prove—the burglary, petitioner's rental of a truck, that truck's use in the burglaries, and the giving of a false name on arrest, and then to attempt to explain away those facts' incriminating implications and to assert the defense of alibi (RT 71:11–26, 72:1–6, 73:21–26, 74:1–10). To have insisted upon recalling all of the witnesses who had appeared at the preliminary hearing would have added nothing to this defense and conceivably could have been adverse to it.

Six witnesses testified at the preliminary examination. Benton Jones testified as to the burglary of the market which he managed and described the property taken (CT 11–21). Gilbert Borden testified to seeing two trucks and an automobile deposit the remnants of the stolen goods on the grounds of the gun club where he served as careaker (CT 22–34). He was unable to identify the occupants of the vehicles (CT 25). Cecelia Forcier testified that petitioner's then co-defendant rented an Avis truck on April 19, 1965 (CT 35–44). George Brown, manager of Central Rentals, testified that petitioner rented a truck at approxi-

mately 2:10 p.m., April 18 (CT 48–49). Police Officer Phillip Punchard testified to the appearance of the burglary scene and paint scrapings taken from the market's loading dock and the truck rented by petitioner (RT 73–79). Officer Donald H. Miller testified to the arrest of petitioner's co-defendant, and to the seizure and identification of various items of physical evidence (CT 81–105). Officer Miller took the stand at the subsequent superior court trial (RT 61–68).

An absolute denial of this testimony was both beyond counsel's power and unnecessary to his theory of defense. Rather than mounting a futile frontal attack, his strategy was, while admitting the substance of the preliminary hearing testimony, to create a situation in superior court wherein that testimony's indirectly incriminating aspects were fossilized within a cold record and were countered by his client's personal and, hopefully, sincere explanations from the stand. The mere fact that this tactic was unsuccessful does not imply that it was not prudent.

Respondent respectfully submits the situation and the issue presented here are identical to those which confronted the Ninth Circuit in *Wilson* v. *Gray*; 345 F.2d 282 (1965) Cert. Den. 382 U. S. 919, and that Court's analysis and conclusion should be adopted here.

> "[W]e agree that the right of an accused to cross-examine and confront prosecution witnesses in a state criminal trial is an essential ingredient of a fair trial. As such it is necessarily a right

embodied in the due process clause of the Fourteenth Amendment. Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, decided April 5, 1965; Cf. Willner v. Committee on Character, etc., 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963); see Brubaker v. Dickson, 310 F. 2d 30 (9th Cir. 1962). But we do not agree that in all cases the waiver of this right must be made by the accused personally rather than by his counsel. It has been consistently held that the accused may waive his right to cross examination and confrontation and that the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics of strategy. E. g., Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912); Cruzado v. People of Puerto Rico, 210 F.2d 789 (1st Cir. 1954); Fukunaga v. Territory of Hawaii, 33 F.2d 396 (9th Cir. 1929); United States v. Meyers, 226 F.Supp. 343 (E.D. Pa. 1964). Here, in the presence of appellee and without any objection on his part, his counsel stipulated that the matter be heard on the transcript of the preliminary hearing, each side retaining the right to produce additional evidence at the trial. The record clearly indicates that under the circumstances of the case as they existed at the time of trial, the decision of appellee's counsel to enter the stipulation was both wise and prudent, a decision deliberately made as a matter of trial tactics and strategy. We hold that under the circumstances of this case the appellee's right to cross examine and confront prosecution witnesses was effectively waived by his counsel." (*Wilson* v.

Gray, supra, pp. 286–288, footnotes omitted. See also *Symons* v. *Klinger,* 372 F.2d 47 (9th Cir. 1967) Cert. Den. 386 U.S. 1040; *Butler* v. *Wilson,* 365 F.2d 308 (9th Cir. 1966); and *Barber* v. *Page,* 381 F.2d 479 (1967 10th Cir.)).

It should be noted that the instant case is not *Brookhart* v. *Janis* (1966) 384 U. S. 1. There, under a singular Ohio procedure, counsel's waiver of cross-examination was held to be the equivalent of a plea of guilty or at best *nolo contendere,* and, as such, wholly inconsistent with the defendant's statement that in no way was he pleading guilty. Here, counsel's stipulation was completely consistent with a vigorous defense and with petitioner's plea of not guilty. (See *Symons* v. *Klinger,* 372 F.2d 47, 50 (9th Cir. 1967).)

Finally, petitioner's implied assertion that California law does not permit counsel to waive a federally protected right for tactical reasons without the express participation of his client must be countered.

The case relied upon by petitioner, *People* v. *Davis,* 48 Cal.2d 241, 309 P.2d 1, for this proposition does not deal with the question. That case involved a defense counsel who suffered a mental breakdown during trial and made a number of damaging statements during argument. When faced with the precise issue in point here, California's courts have consistently held that when defense counsel, in the defendant's presence and without objection by him agrees

to a stipulation of the type in question here, the defendant waives any subsequent objection. The most recent of these cases is *People* v. *Foster* (1967) 67 A.C. 614, 617; 63 Cal.Rptr. 288; 432 P.2d 976.

C. PETITIONER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS NOT DENIED HIM

Central to petitioner's position, but unstated throughout his petition is an assertion that he was denied his right to confront and cross-examine the witnesses against him. The record here shows that petitioner did, in fact, enjoy that right.

The Sixth Amendment, of course, guarantees the right of confrontation and this Court has held that guaranty applicable to the States through the Fourteenth Amendment (*Pointer* v. *Texas* (1965) 380 U. S. 400). Here petitioner had that right.

The Sixth Amendment states that: "In all criminal prosecutions, the accused shall enjoy . . . the right . . . to be confronted with the witnesses against him; . . ." It does not state that that confrontation, once had, must be repeated each time the testimony in question is received into evidence. *Pointer* v. *Texas*, *supra*, bears this out.

In *Pointer*, the court was concerned with the reception into evidence at trial of the transcript of the testimony of a witness taken at the preliminary examination. The defendant there had not had counsel at the preliminary, and thus was not then able effectively

to cross-examine the witness in question, and the witness was not available at time of trial. This Court held that under these circumstances, Pointer had been denied his Sixth Amendment right to confrontation. However, this Court stated:

> "[T]he case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." (*Pointer* v. *Texas, Supra,* page 407.)

The instant case is that "different one." Here petitioner was confronted with the witnesses against him at a full-fledged hearing at which he was represented by counsel who had and exercised an ample opportunity to cross-examine. All that petitioner gave up was an opportunity to confront those witnesses a second time at trial—an opportunity which his counsel for evident tactical reasons decided to forego. In such circumstances, petitioner has not been denied his right to confront the witnesses against him in any constitutional sense (*Symons* v. *Klinger*, 372 F.2d 47, 49 (9th Cir. 1967); Cert. Den. 386 U.S. 1040; *Butler* v. *Wilson*, 365 F.2d 308, 310 (9th Cir. 1966); *Barber* v. *Page*, 381 F.2d 479, 481 (10th Cir. 1967)).

CONCLUSION

Respondent respectfully submits that for the foregoing reasons, the instant petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS C. LYNCH
Attorney General
of the State of California

DORIS H. MAIER
Assistant Attorney General

EDWARD A. HINZ, JR.
Deputy Attorney General

DANIEL J. KREMER
Deputy Attorney General

Attorneys for Respondent

APPENDIX

California Penal Code

SECTION 182:

If two or more persons conspire:

1. To commit any crime.

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

3. Falsely to move or maintain any suit, action or proceeding.

4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.

5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

6. To commit any crime against the person of the President or Vice President of the United States, the governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for not less than 10 years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of

the said felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit such felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in subdivision 4 of this section, they shall be punishable by imprisonment in the state prison for not more than 10 years or by imprisonment in the county jail for not more than 1 year, or by a fine not exceeding five thousand dollars ($5,000), or both.

When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both.

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done.

SECTION 459:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill barn,

stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grant or petit larceny or any felony is guilty of burglary.

SECTION 496:

1. Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the same to be so stolen or obtained, or who conceals, withholds or aids in concealing or withholding any such property from the owner, knowing the same to be so stolen or obtained, is punishable by imprisonment in a state prison for not more than 10 years, or in a county jail for not more than 1 year.

2. Every person whose principal business is dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of such person, who buys or receives any property which has been stolen or obtained in any manner constituting theft or extortion, under such circumstances as should cause such person, agent, employee or representative to make reasonable inquiry to ascertain that the person from whom such property was bought or received had the legal right to sell or deliver it, without making such reasonable inquiry, shall be presumed to have bought or received such

property knowing it to have been so stolen or obtained. This presumption may, however, be rebutted by proof.

3. When in a prosecution under this section it shall appear from the evidence that the defendant's principal business was as set forth in the preceding paragraph, that the defendant bought, received, or otherwise obtained, or concealed, withheld or aided in concealing or withholding from the owner, any property which had been stolen or obtained in any manner constituting theft or extortion, and that the defendant bought, received, obtained, concealed or withheld such property under such circumstances as should have caused him to make reasonable inquiry to ascertain that the person from whom he bought, received, or obtained such property had the legal right to sell or deliver it to him, then the burden shall be upon the defendant to show that before so buying, receiving, or otherwise obtaining such property, he made such reasonable inquiry to ascertain that the person so selling or delivering the same to him had the legal right to so sell or deliver it.

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